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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1965

No. 598

GERHARD BRASCH,
Petitioner,
vs.
STATE COMPENSATION INSURANCE FUND,
STATE PERSONNEL BOARD,
Respondents.

BRIEF FOR RESPONDENT
STATE COMPENSATION INSURANCE FUND
IN OPPOSITION TO
PETITION FOR A WRIT OF CERTIORARI
to the Supreme Court of the
State of California

OPINIONS BELOW

The Municipal Court of the City and County of San Francisco, California (the trial court) made and entered its Judgment of Dismissal on November 12, 1964, without opinion after demurrer sustained with leave to plaintiff (petitioner herein) to amend his complaint, no amended complaint having been filed within the time allowed. The Superior Court of the State of California in and for the City and County of San Francisco, Appellate Department, on March 12, 1965, without opinion ordered Judgment Affirmed. On May 4, 1965, said Appellate Department without opinion denied Mr. Brasch's application for rehearing and also denied certification to the California District Court of Appeal. On June 2, 1965, without opinion, the California District Court of Appeal denied Mr. Brasch's petition for writ of certiorari. On June 30, 1965, the California Supreme Court denied Mr. Brasch's petition for a hearing without opinion.

JURISDICTION

The order of the California Supreme Court denying Mr. Brasch's petition for a hearing was made and entered June 30, 1965.

The jurisdiction of this Court is invoked under 28 U.S.C., sec. 1257 (3).

QUESTION PRESENTED

Whether the petition for writ of certiorari presents any question compelling the exercise of jurisdiction by this Court where:

1. Not one of the questions presented in said petition was pleaded in, or raised by, petitioner's complaint filed in the trial court, which court granted a judgment of dismissal after demurrer sustained with leave to amend but petitioner failed to amend his complaint within the time allowed;

2. The record contains no showing that a federal question was presented to the trial court although petitioner did mention the Constitution of the United States in his Notice of Appeal from the Judgment of Dismissal rendered by the trial court, the Constitution being mentioned in a statement of "History of the Case" but not in the statement of "Reasons" for the appeal.

CONSTITUTIONAL PROVISIONS INVOLVED

This case purports to involve "the pertinent portions of the Fifth and Fourteenth Amendments to the Constitution of the United States." (Petition for Writ of Certiorari, page 5.)

STATEMENT OF THE CASE

Petitioner, Gerhard Brasch, in propria persona, filed his Complaint for Damages in the Municipal Court of the City and County of San Francisco, State of California. The defendants named therein were State Compensation Insurance Fund and State Personnel Board. That complaint contains nine alleged causes of action. A copy of that complaint is printed in the Appendix at pages i to vi.

That complaint does not draw into question the validity of a treaty or statute of the United States. It does not draw into question the validity of a State statute upon the ground of its being repugnant to the Constitution, treaties or laws of the United States. It does not specially set up or claim any title, right, privilege or immunity under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

State Compensation Insurance Fund demurred to said complaint and to each alleged cause of action thereof upon six separate grounds:

1. The Court lacked jurisdiction in that plaintiff failed to allege that he had exhausted his administrative remedies.

2. Failure to state facts sufficient to constitute a cause of action.

3. Any alleged cause of action appeared to be barred by the Statute of Limitations.

4. The complaint was ambiguous.

5. The complaint was unintelligible.

6. The complaint was uncertain.

On August 14, 1964, the demurrer was sustained with twenty days leave allowed to Mr. Brasch in which to amend his complaint. Thereafter, upon the request of an attorney acting for Mr. Brasch, time was extended to plaintiff to and including September 11, 1964 within which to amend his complaint. Mr. Brasch later claimed that on October 26, 1964, he *informed* the Court that he would amend his complaint as soon as he received certain papers from said attorney and that said attorney "no longer has power of attorney to represent him."

No amendment to the complaint was ever filed. No amended complaint was ever filed. On November 12, 1964, upon *ex parte* motion of State Compensation Insurance Fund, the Court made and entered its Judgment of Dismissal dismissing the action with prejudice.

Mr. Brasch failed to move the Court to set aside said judgment. On November 23, 1964, he filed a Notice of Appeal, appealing to the Superior Court of the State of California, in and for the City and County of San Francisco, from said Judgment of Dismissal.

In said Notice of Appeal, Mr. Brasch set forth a total of seven reasons for his appeal. Not one of those seven reasons made any mention of the Constitution, treaties or laws of the United States. Not one of said seven reasons set up or claimed any title, right, privilege or immunity under the Constitution, treaties or

statutes of, or commission held or authority exercised under the United States. Under the heading, "History of the Case," Mr. Brasch did state:

> "The many futile endeavors by the plaintiff to find an attorney willing to file a complaint in the above entitled matter and the facts explained above prove, in the opinion of the plaintiff, beyond any doubt that he is the only layman in the annals of jurisprudence who could not find an attorney willing to protect his rights under the laws and the Constitution of the State of California and under the Constitution of the United States in court and who never received a fair hearing by the State of California concerning his grievances, explained in his complaint, which means that he was denied the equal protection of the laws and deprived of property without due process of law in violation of the Fourteenth Amendment of the Constitution of the United States."

Mr. Brasch added a prayer in which he included a request that the court

> ". . . protect the rights of plaintiff . . . under the Constitution of the United States . . ."

In Appellant's Opening Brief which Mr. Brasch filed in the said California Superior Court he mentioned the Fifth and the Fourteenth Amendments to the Constitution of the United States. His statements in that regard were in reference to his view as to why or how he had a cause of action and suffered the damages for which he had prayed in his complaint. His references to those Amendments *failed to relate to any claim of error on the part of the trial court.*

State Compensation Insurance Fund filed its Answering Brief. No mention was made therein to the Constitution, treaties or laws of the United States.

Mr. Brasch then filed Appellant's Answering Brief in which he attempts to show, for the *first* time, that because of the Fifth and Fourteenth Amendments the "statute of limitations of six years of the United States applies to the causes of action of the appellant, and his causes of action are not barred by the statute of limitations." He also, for the first time, claimed that the statute of limitations was "interrupted" on December 2, 1961 because he had submitted a petition to the Chief Justice of the District Court of the United States in San Francisco, California, requesting that Court to act because his cause involved violations of his rights under the Fourteenth Amendment. Contrary to petitioner's Statement (Petition, page 14), we are unable to discover where or how "petitioner specifically claimed that the respondent State Compensation Insurance Fund violated his rights under two provisions of the Fourteenth Amendment. . . ."

The Appellate Department of said Superior Court denied the appeal of Mr. Brasch. Mr. Brasch still did not move the trial court to set aside the Judgment of Dismissal. Mr. Brasch then filed with said Superior Court his petition for rehearing or in the alternative for certification to the District Court of Appeal of the State of California. On May 4, 1965, the Court denied rehearing and denied certification. On May 11, 1965, the time in which Mr. Brasch could have moved

the trial court to set aside the Judgment of Dismissal expired without such motion ever being made.

Mr. Brasch petitioned for a writ of certiorari, which petition was denied by the District Court of Appeal for the State of California. He then petitioned for a hearing by the California Supreme Court, which petition was denied. His petition to this Court followed.

SPECIFICATION OF ERRORS URGED BY PETITIONER

Although it is difficult to condense them, it appears that petitioner's contentions are four in number:

1. That respondent State Compensation Insurance Fund denied him the equal protection of the laws under the Fourteenth Amendment of the Constitution of the United States by refusing to appoint or promote him because of his age.

2. That said State Fund, by such refusal, and the State Personnel Board, by demoting him in rank on an employment list, deprived him of property without due process of law in violation of the Fifth and Fourteenth Amendments of the Constitution of the United States.

3. That "the statute of limitations of six years of the United States applies to his cause."

4. That said State Fund by informing the Governor of California "that it is not in the Fund's best interest to offer petitioner reassignment or promotion" denied him due process of law in violation of the Fifth and Fourteenth Amendments of the Constitution of the United States.

ARGUMENT

1. NO FEDERAL QUESTION WAS PROPERLY RAISED OR PRESERVED IN THE STATE COURTS.

None of petitioner's contentions as stated immediately above was set forth in his Complaint for Damages filed by him in the trial court. (Appendix, pages i to vi.) He never amended that complaint although given leave to do so. Even now, Mr. Brasch does not contend that any of those contentions were presented to the trial court prior to judgment therein. (Petition, pages 5-7.) Thus, those contentions were never properly presented for determination by any Court. Not having been presented properly below, they are not now properly before this Court. *Bailey v. Anderson* (1945), 326 U.S. 203, 206-207, 66 S.Ct. 66, 90 L.Ed. 3, 6.

Briefs filed in the state courts form no part of the state court record for the purpose of Supreme Court review and they cannot be relied upon to establish that a federal question was raised, even if they are incorporated into the record sent to this Court. *Live Oak Water Users' Assn. v. Railroad Commission of California* (1925), 269 U.S. 354, 357-358, 46 S.Ct. 149, 70 L.Ed. 305, 309.

When Mr. Brasch appealed from the trial court's Judgment of Dismissal, the only actual question before the Appellate Department of the California Superior Court was whether that judgment was proper. That judgment was predicated upon Mr. Brasch's failure to amend his complaint within the time allowed after the demurrer to the complaint had been

sustained. Mr. Brasch's petition does *not* show that he ever even entertained a thought of a federal question prior to the entry of that judgment adverse to him.

---

2. THE PETITION FAILS TO DEMONSTRATE THAT THE DECISIONS BELOW DID NOT REST UPON A STATE GROUND WHICH INDEPENDENTLY AND ADEQUATELY SUPPORTS THE JUDGMENT.

Mr. Brasch's petition (page 6) shows that the (California) statute of limitations was but one of the grounds upon which the State Fund demurred to his complaint. Nowhere does he set out the basis upon which the demurrer was sustained. He did not do so in his appeal nor in his petitions to the California Courts. The State Fund had demurred upon six grounds. If any of the other five grounds was sufficient, Mr. Brasch's appeal was properly denied by the Appellate Department of the California Superior Court without even reaching the question of the statute of limitations. (California Code of Civil Procedure, section 475; Cal. Stats. 1897, page 44. See Appendix, page vii.)

At no time did Mr. Brasch move the trial court to set aside its Judgment of Dismissal. He had time to so move even after rehearing of his appeal was denied on May 4, 1965. California Code of Civil Procedure, section 473 (Cal. Stats, 1961, ch. 722, page 1965), reads in part:

> ". . . The court may, upon such terms as may be just, relieve a party or his legal representative

from a judgment, order, or other proceeding taken against him through his mistake, inadvertence, surprise or excusable neglect. Application for such relief must be accompanied by a copy of the answer or other pleading proposed to be filed therein, otherwise the application shall not be granted, and must be made within a reasonable time, in no case exceeding six months, after such judgment, order or proceeding was taken; . . ."

Assuming, *arguendo,* that Mr. Brasch's appeal did turn upon the statute of limitations, his contention that "the statute of limitations of six years of the United States applies to his cause" is fallacious.

Petitioner has not pointed out any statute of the United States providing for a limitation of six years. The case cited at page 29 of his petition (*Kendall v. United States,* 107 U.S. 123, 125, 17 Otto 123, 27 L. Ed. 437) is *not* in point. That case dealt with claims against the United States, cognizable by the Court of Claims. It did not deal with a claim of any person who on appeal from a judgment of dismissal by a state trial court claimed for the first time that the Constitution of the United States gives him a six-year period of limitations within which to bring an action against an employer other than the United States for damages resulting from failure to promote that person as an employee.

California Government Code section 19630 (Cal. Stats. 1961, ch. 625, page 1783) reads:

"No action or proceeding shall be brought by any person having or claiming to have a cause of

> action or complaint or ground for issuance of any complaint or legal remedy for wrongs or grievances based on or related to any civil service law in this State or the administration thereof unless such action or proceeding is commenced and served within one year after such cause of action or complaint or ground for issuance of any writ or legal remedy first arose. Such a person shall not be compensated for the time subsequent to the date when such cause or ground arose. Where an appeal is taken from a decision of the board the cause of action does not arise until the final decision of the board."

Where it clearly appears on the face of the complaint that the cause of action is barred by the statute of limitations, the objection may be taken by demurrer. *McFarland v. Holcomb* (1898), 123 Cal. 84, 55 Pac. 761. Mr. Brasch in his complaint alleged the times of various examinations, incidents and transactions, all as occurring before July 28, 1961. His complaint was filed July 29, 1964, more than three years after the most recent conceivably-alleged cause of action arose. A memorandum of points and authorities which had been filed with, and in support of, the demurrer of the State Fund also brought to the attention of the trial court that California also has a general three-year statute of limitations in addition to Government Code section 19630, *supra*.

This Court has said that where the highest court of a state delivers no opinion in rendering a judgment, and it appears that the judgment *might* have rested upon a nonfederal ground, the Court will not take

jurisdiction to review the judgment. *Stembridge v. Georgia* (1952), 343 U.S. 541, 96 L.Ed. 1130, 72 S.Ct. 834; *Fay v. Noia* (1963), 372 U.S. 391, 428, 9 L.Ed.2d 837, 863, 83 S.Ct. 822.

In the case at bar, each and all of the judgments of the appellate courts could have rested upon one or more of the following independent and adequate state grounds:

1. Alleged causes of action barred by limitations of time.

2. No cause of action stated.

3. Remedies not exhausted prior to suit.

4. Remedies not exhausted prior to appeal.

5. Complaint ambiguous, uncertain or unintelligible.

6. No prejudicial error.

7. Failure to amend complaint before expiration of leave to amend.

3. THE PETITION DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION.

The granting of certiorari is discretionary and even if jurisdiction on the petition for the writ were present, such presence does not determine the exercise of such jurisdiction. *Hammerstein v. Superior Court of California* (1951), 341 U.S. 491, 492, 71 S.Ct. 820, 75 L.Ed. 1135, 1137; rehearing denied 342 U.S. 843, 72 S.Ct. 21, 96 L.Ed. 637.

Certiorari should not be granted except in cases involving principles the settlement of which is of importance to the public, as distinguished from the parties. *Rice v. Sioux City Memorial Park Cemetery,* 349 U.S. 70, 79, 75 S.Ct. 614, 99 L.Ed. 897, 904.

Mr. Brasch's petition fails to contain any special and important reason for the granting thereof. (Rules of the Supreme Court, Rule 19, 28 U.S.C.)

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

Dated, San Francisco, California,
October 11, 1965.

Respectfully submitted,
T. GROEZINGER,
LOTON WELLS,
Counsel for Respondent
State Compensation Insurance Fund.

J. J. VONK,
DAVID GREEN,
Of Counsel.

(Appendix Follows)

Appendix

Gerhard Brasch, in propria persona
3035 Gough Street, Apt. 8
San Francisco, California 94123
Telephone: 673-2085

In the Municipal Court of the City and County of San Francisco
State of California

No. 519083

GERHARD BRASCH,
Plaintiff,
vs.
STATE COMPENSATION INSURANCE FUND,
STATE PERSONNEL BOARD,
Defendants.

COMPLAINT FOR DAMAGES

Plaintiff complains and alleges:

I.

For a first cause of action that he, 48, during his employment as Intermediate Clerk with the State Compensation Insurance Fund in San Francisco, California, from April, 1957 to January, 1961, passed a written examination and an interview before a qualification appraisal panel for the class Compensation Insurance Technician and that his rank on the open list dated January 15, 1958 was 005; that the Per-

sonnel Officer of the State Compensation Insurance Fund a few days after the establishment of this list informed the plaintiff that he had to fill several openings in the claims department from this list and that he asked the plaintiff to waive his right for employment in the claims department since the public would not understand him on the phone because the plaintiff has an accent; that the plaintiff refused to waive; that the Personnel Officer understood the plaintiff without any difficulty; that the Personnel Officer explained to the plaintiff among other things that "I have the power to exhaust the whole list completely, to go down the list all the way without considering you for any other position unless you waive"; that the plaintiff finally waived because the Personnel Officer and the Assistant Personnel Officer promised to give him the first opening in the payroll department for which work they considered him qualified if he would waive his right for employment in the claims department; that in the fall of 1958 the Personnel Officer and the Superintendent of the payroll department interviewed the plaintiff for an opening in the payroll department; that the plaintiff was not offered a position and that the list expired.

II.

And for a second cause of action that he filed a grievance concerning his waiver alleged in I, supra, with Mr. John F. Fisher, Executive Officer of the State Personnel Board, Sacramento, California by certified mail with return receipt on May 27, 1959; that he enquired on January 2, 1960 of Mr. Fisher

what decision Mr. Fisher had made; that Mr. Fisher informed the plaintiff that they had no record of his letter, and that the plaintiff sent Mr. Fisher a copy; that thereupon Mr. Fisher advised the plaintiff that the statute of limitations barred acting upon his grievance and that there was no evidence of the waiver of the plaintiff or of any illegal appointments in the records.

III.

And for a third cause of action that a few weeks after he had passed a written examination for the Compensation Insurance Assistant class in March of 1959 the Superintendent of Underwriting at that time explained to the plaintiff at the end of an interview for this position, "I understand you. If I give you a job in my department, you would be promoted and you would have to talk to the public. The public will not understand you because you have an accent. I cannot give you a job in my department;" that he would make an effort with the Personnel Officer to get the plaintiff a job in the accounting or in the payroll department; that the plaintiff was disqualified in the interview for this class by a qualification appraisal panel.

IV.

And for a fourth cause of action that on December 30, 1959 he took a test for the Compensation Insurance Assistant class and that the successor of the Superintendent of Underwriting in III, supra, informed the plaintiff on the next day that he had passed the test; that he refused to appoint the plain-

tiff, explaining to him that "You have twenty more years on your back. We have to get the best of the applicants, and you do not compare favorably with them. You have to go back to your file room;" that he also explained to the plaintiff that the qualification appraisal panel has instructions as to the type of people the Fund wants and that the panel in their disqualifying reasons could not state that the plaintiff is too old; that the Superintendent mentioned furthermore, "You have been so long in the file room; apparently you are not getting any place. You are running against a wall;" that the Superintendent suggested very definitely to the plaintiff to look for work somewhere else; that he was disqualified in the interview for the Compensation Insurance Assistant class by a qualification appraisal panel.

V.

And for a fifth cause of action that he filed a grievance concerning discrimination on basis of age in the State civil service with Mr. John F. Fisher, Executive Officer of the State Personnel Board in Sacramento, California, explaining that "I feel aggrieved because instead of encouraging me in my efforts to advance in the State civil service one suggested to me that I look for work somewhere else although I have been doing a good job in my basement file room for about two years and eight months, passed an interview for Compensation Insurance Technician, and the State Personnel Board granted my appeal from the disqualification in the interview for the Accounting Technician II class with the Fund"; that Mr. Fisher

rejected the grievance of plaintiff two weeks later, writing that ". . . it does not appear that your grievance is in an area over which the State Personnel Board has jurisdiction. . . . we found no evidence in your letter of a violation of civil service procedures." That plaintiff enquired on January 30, 1960 and on February 27, 1960 of Mr. Fisher about the authority having jurisdiction over his grievance; that he received no reply.

VI.

And for a sixth cause of action that he wrote on January 24, 1961 to Mr. John F. Fisher, Executive Officer of the State Personnel Board, Sacramento, California that "my rank on the Accounting Technician II promotional employment list of the State Compensation Insurance Fund dated June 6, 1960 was 2 and is now 1. As to my knowledge positions for Accounting Technician II and Accounting Technician III were filled by people not on this list. I would appreciate it very much if you would kindly let me know why I was bypassed although my rank on the list was 2 and later 1." That the plaintiff was informed on February 2, 1961 that two appointments had been made from an *older* Accounting Technician II list for the State Compensation Insurance Fund dated December 1, 1958 on which the eligibility of the plaintiff had been established on February 19, 1959.

VII.

And for a seventh cause of action that he furthermore was informed in the letter dated February 2,

1961, mentioned in VI, supra, that "Your name will be retained on the Accounting Technician II spot list for Fresno. Your standing on this list is currently number four." That the rank of plaintiff on the Accounting Technician II list for Fresno dated November 12, 1959 was 2.

VIII.

And for an eighth cause of action that he informed the members of the State Personnel Board during the hearing of his appeal from his disqualification in the interview for the Compensation Insurance Assistant class on October 8, 1959 that the transcript of this interview contained several statements which he had not made; that a member of the Board made a statement such as, "How could that happen?"

IX.

And for a ninth cause of action that the defendants did the acts herein alleged maliciously and oppressively. Plaintiff therefore is entitled to exemplary and punitive damages in an additional sum as the Honorable Court may determine.

Wherefore, plaintiff prays judgment against the defendants for loss of earnings for the sum of $2,150.00 plus interest at the rate of 5% since January 1, 1961 together with costs of suit incurred herein, and for such other relief as may be proper.

Gerhard Brasch

Municipal Court Filed—Summons Issued Jul 29 1964
James M. Cannon, Clerk
By J. Kostolefsky, Deputy

CALIFORNIA CODE OF CIVIL PROCEDURE

§ 475. **No error or defect to be regarded unless it affects substantial rights.** The court must, in every stage of an action, disregard any error, improper ruling, instruction, or defect, in the pleadings or proceedings which, in the opinion of said court, does not affect the substantial rights of the parties. No judgment, decision, or decree shall be reversed or affected by reason of any error, ruling, instruction, or defect, unless it shall appear from the record that such error, ruling, instruction, or defect was prejudicial, and also that by reason of such error, ruling, instruction, or defect, the said party complaining or appealing sustained and suffered substantial injury, and that a different result would have been probable if such error, ruling, instruction, or defect had not occurred or existed. There shall be no presumption that error is prejudicial, or that injury was done if error is shown. [Enacted 1872; Am. Stats. 1897, p. 44.]